IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NEUROSOURCE, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
JEFFERSON UNIVERSITY PHYSICIANS	:	NO. 00-CV-5401

MEMORANDUM

Padova, J. **February , 2001**

Plaintiff NeuroSource, Inc. filed the instant suit seeking monetary damages for breach of contract and injunctive relief against Jefferson University Physicians. Before the Court are two related motions: Defendant's Motion to Stay and Plaintiff's Cross Motion to Stay Arbitration. Defendant seeks to stay this proceeding to permit arbitration of its own claims and the claims asserted in Plaintiff's Complaint, while Plaintiff seeks to enjoin arbitration of claims made earlier by Defendant. For the reasons that follow, the Court grants Defendant's Motion and denies Plaintiff's Motion.

I. BACKGROUND

The Complaint asserts the following allegations. NeuroSource, Inc. ("NeuroSource") is a neuromedical management and practice development company that contracts to manage the business aspects of neurosurgery practices, and assist in the development of neuromedical services and centers. Jefferson University Physicians ("Jefferson") conducts a multi-specialty group medical practice providing medical services to the general public.

On March 1, 1999, the parties entered into a Neurosurgery Service Agreement ("Agreement")

by which NeuroSource would provide management, administrative, and consulting services to improve the operational and financial performance of Jefferson's neurosurgery practice. In return, Jefferson promised to pay NeuroSource a fixed monthly management fee ("Base Fee") and a variable management fee based on the financial performance of the neurosurgery department ("Variable Fee") (collectively "Management Fees"). Jefferson was also obligated to reimburse NeuroSource for all expenses incurred on behalf of Jefferson ("Practice Expense"). The Agreement originally ran until June 30, 2001, subject to automatic renewal. Either party could terminate the Agreement upon compliance with certain conditions. The Agreement further provided for arbitration of specified disputes.

NeuroSource began managing the Jefferson neurosurgery department practice pursuant to the Agreement in March, 1999. NeuroSource asserts that over time its relationship with Jefferson deteriorated as Jefferson rejected many of NeuroSource's recommendations and proposals. Jefferson allegedly ceased making the monthly payments of the Base Fee in March 2000, or reimbursing Practice Expenses incurred after July 31, 2000. Jefferson allegedly has also failed to pay the Variable Fee for the first fiscal year of the Agreement.

On October 4, 2000, Jefferson evicted NeuroSource's employees from its premises and sent NeuroSource a demand for arbitration ("Arbitration Demand") and notice of termination of the Agreement. Jefferson's Arbitration Demand seeks $ 1.2 million in monetary damages, dissolution and rescission of the contract, and states claims for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, tortious interference with contract and economic relationship, deceit, and misrepresentation. (Breen Decl. Ex. H.) Jefferson justifies these actions with allegations that NeuroSource was trying to induce Jefferson's staff neurosurgeons to resign

from Jefferson and establish their own practice or join that of other employers.

NeuroSource's Complaint asserts five counts against Jefferson. Count I seeks money damages for breach of contract because Jefferson breached the Agreement by failing to pay the Variable and Base Fees, failing to reimburse the practice expenses, and improperly terminating the Agreement. Counts II and III seek money damages for Jefferson's conduct under quantum meruit and unjust enrichment theories, respectively. Count IV alleges a claim for defamation based on Jefferson's allegedly public eviction of NeuroSource from its premises. Lastly, Count V seeks an injunction against the arbitration initiated by Jefferson.

II. DISCUSSION

Jefferson seeks to stay this action pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, pending arbitration of Jefferson's claims stated in the Arbitration Demand, and further argues that NeuroSource's claims asserted in the instant suit are subject to arbitration. NeuroSource opposes arbitration of any of its claims and has moved to stay Jefferson's arbitration.

The arbitration clause provides, and the parties agree, that it falls within the scope of the FAA. As a matter of contract, no party can be forced to arbitrate unless that party has entered into an agreement to do so. Painewebber Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990). The FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." John Hancock Mutual Life Ins. Co. v. Olick, 151 F.3d 132, 136 (3d Cir. 1998) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp, 460 U.S. 1, 25 n. 32 (1983)). Arbitration agreements are enforceable "save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2 (1994). The FAA thus presumptively favors the enforcement of arbitration agreements by making such agreements enforceable to the same extent as other contracts.

Harris v. Green Tree Fin. Corp., 183 F.3d 173, 178 (3d Cir. 1999). State law applies to issues concerning the validity, revocability and enforceability of contracts. Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 684 (1996); Northwestern Nat'l Life Ins. Co. v. U.S. Healthcare, Inc., No. Civ. A. 96-4659, 1998 WL 252353, at *4 (E.D. Pa. May 11, 1998).

The FAA limits the role of courts to determine whether the parties entered into a valid arbitration agreement and whether the specific dispute falls within the scope of that agreement. Olick, 151 F.3d at 137. In conducting this review, the court should apply "ordinary contractual principles, with a healthy regard for the strong federal policy in favor of arbitration." Moses H. Cone, 460 U.S. at 24. When determining whether a dispute falls within the scope of the agreement, the court may not stay arbitration unless the court can state "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Painewebber, 921 F.2d at 511 (quoting United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-82 (1960)). Any doubts concerning the scope of the arbitrable issues must be resolved in favor of arbitration. First Liberty Inv. Gp. v. Nicholsberg, 145 F.3d 647, 653 (3d Cir. 1998).

The Agreement contains the following clause providing for exclusive[1] arbitration of claims between the parties:

> Except as specifically provided herein, any claim or dispute arising out of or

[1]The arbitration clause states as follows:

> The Parties hereto expressly waive any right to resolve any claim or dispute covered by this section 9.6 through other means, including by filing a lawsuit in court for trial by the court or before a jury. The Parties shall be precluded from bringing or raising in court or before another forum any claim or dispute which could have been brought or raised pursuant to the arbitration procedures provided for herein.

(Id.)(emphasis omitted)

> relating to any provision of this Agreement, and any legal or equitable claim, in tort, in contract, at common law, under local, state or federal statute and/or alleging violation of any legal obligation between NeuroSource and [Jefferson] . . . shall be resolved, as the sole remedy for the resolution of such claim or dispute, by arbitration pursuant to the Federal Arbitration Act ("FAA").

(Neurosurgery Services Agreement ("Agreement") Breen Decl. Ex. A ¶ 9.6 (emphasis omitted).)

Several types of claims are exempt from arbitration:

> Notwithstanding the above, it is agreed that this arbitration provision does not apply to (i) claims under Article VII and claims by [Jefferson] pursuant to section 4.12, or (ii) claims by NeuroSource for injunctive or equitable relief, including without limitation claims related to unauthorized disclosure of confidential information, trade secrets, intellectual property, unfair competition or claims pursuant to section 5.10.

(Id. (emphasis omitted).)

A. Arbitrability of Jefferson's Claims

NeuroSource advocates several arguments why Jefferson's claims are not subject to the arbitration clause contained in the Agreement. NeuroSource first contends that Jefferson's claims arise under various exclusions to the arbitration provision. Alternatively, NeuroSource argues that Jefferson failed to comply with the Agreement's condition precedent to arbitration. The Court will address each argument in turn.

1. Exclusion of Article VII Claims

The arbitration clause provides for an exception to compulsory arbitration:

> Notwithstanding the above, it is agreed that this arbitration provision does not apply to (i) claims under Article VII . . .

(Agreement ¶ 9.6.) (emphasis in original). Article VII generally details the conditions under which either party may terminate the Agreement for cause or by agreement. (Id. at 25-28.) Article VII

further relieves the parties of all further obligations to each other, outside of a few exceptions not applicable here, upon termination.[2] (Id. ¶7.2.)

NeuroSource primarily argues that Jefferson's claims arise under Article VII because Jefferson had already terminated the Agreement by the time it filed its Arbitration Demand. This argument is based on the premise that the exclusion of claims under Article VII from the arbitration provision indicates the parties' intent to engage only in arbitration while the parties remain in an ongoing relationship. (See Breen Decl. ¶ 4 and Ex. H.) The Court rejects NeuroSource's argument. The plain language of the contract provides no basis for construing the phrase 'claims under Article VII' to encompass a claim only because it was filed after termination of the contract so as to restrict the arbitration clause to situations where the parties maintain an ongoing relationship.

NeuroSource also argues that Jefferson's claims arise under Article VII because they essentially concern the effects of the termination of NeuroSource and whether Jefferson had cause to terminate NeuroSource and seek an accounting of the parties' remaining obligations after termination. Jefferson's Arbitration Demand characterizes the nature of the dispute as "breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, tortious

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[2]Section 7.3 states:

> Upon termination of this Agreement, as heretofore provided, neither Party shall have any further obligations hereunder except for (i) obligations accruing prior to the date of termination, including, without limitation, payment of the Management Fees, Practice Expenses paid or reported by NeuroSource, (ii) obligations, promises or covenants expressly set forth herein to extend beyond the Term under the circumstances giving rise to such termination, including, without limitation, indemnity, confidentiality and noncompetition provisions, which provisions shall survive the expiration or termination of this Agreement by NeuroSource for cause, and (iii) "tail" insurance coverage as set forth in Section 8.6(b).

(Id. ¶ 7.3.)

interference with contract and economic relationship, deceit, and misrepresentation," and seeks the relief of rescission and restitution damages. (See Breen Decl. Ex. H.) Contrary to NeuroSource's assertion, the procedures by which any termination was effected is tangential to the primary issues raised by Jefferson's claim, namely whether NeuroSource breached the Agreement by failing to comply with its obligations assumed under Article IV or fraudulently induced Jefferson to enter the contract by obscuring its true intentions. Rescission is merely a legal remedy for breach of contract, not the central issue in the dispute between the parties.

For the foregoing reasons, the Court is unable to say with positive assurance that Jefferson's claims arise under Article VII of the Agreement and as such would be excepted from the arbitration provision.

2. Exclusion of Claims Regarding Confidential Information

NeuroSource next argues that Jefferson's claim that NeuroSource fraudulently induced the contract by hiding its true intent to take control of its neurosurgery practice falls within an express exclusion from arbitration. The arbitration clause excludes from mandatory arbitration claims made by Jefferson pursuant to section 4.12 of the Agreement. Section 4.12 relates to confidential and proprietary information:

> NeuroSource will not disclose any Confidential Information of [Jefferson] to persons without [Jefferson's] consent. NeuroSource will not, directly or indirectly, use such Confidential Information in a manner detrimental to [Jefferson], and NeuroSource will keep such Confidential Information confidential and will ensure that its affiliates and advisors who have access to such Confidential Information comply with these nondisclosure obligations.

(Agreement ¶ 4.12 (a).) NeuroSource argues that this provision broadly covers any misappropriation of Jefferson's business opportunities, such as the stealing of Jefferson's physicians, citing a

statement contained in section 4.12 (c): "NeuroSource understands and acknowledges that the provisions in this section 4.12 are designed to preserve the business opportunities of [Jefferson] and the individual Physicians of [Jefferson]."

NeuroSource's argument is without merit. The Agreement does not define confidential information to include tangible human capital such as the staff physicians. Rather, the Agreement defines confidential information as data and information:

> any and all financial, technical, commercial or other information of NeuroSource or [Jefferson] as applicable (whether written or oral), including, without limitation, all information, notes, studies, patient lists and records, reports, analyses, financial statements, compilations, forms, business or management methods, marketing data, fee schedules, peer review information, credentialing information, quality assurance and utilization review information, interpretations, projections, forecasts or trade secrets of NeuroSource or [Jefferson] as applicable.

(Agreement at 2.) Furthermore, section 4.12 also does not contain a noncompete clause with respect to NeuroSource's interactions with the staff physicians. The Court, therefore, concludes that section 4.12 does not encompass Jefferson's claims.

3. Failure to Comply with Condition Precedent

Lastly, NeuroSource argues that Jefferson cannot arbitrate its claims because it failed to comply with the Agreement's condition precedent to arbitration. The Agreement provides as follows:

> The Parties agree to meet and confer on any issue that is the subject of a material dispute under this Agreement. If they cannot resolve a dispute after exhaustion of the meeting, they will submit the issue(s) to binding arbitration.

(Agreement ¶ 9.6.) NeuroSource contends that this requirement that the parties meet and confer

about disputes prior to submitting an arbitration demand constitutes a condition precedent to arbitration and Jefferson's lack of compliance precludes it from seeking arbitration of its claims. In support, NeuroSource submits the declaration of Peter Breen, NeuroSource's President and CEO, stating that Jefferson refused his requests for such a meeting. (See Breen Decl. ¶ 5.) Jefferson argues that compliance with condition precedents is a matter of procedural arbitrability that must be submitted to the arbitrator rather than decided by this Court. The Court agrees.

Courts traditionally hold that the question of whether the prerequisites to arbitration have been fulfilled are questions for the arbitrator and not for the court. Once the court has determined that the parties consented to arbitrate a particular dispute, any further matters surrounding the dispute must be resolved by the arbitrator. Bell-Atlantic-Pa., Inc. v. Comm. Workers of Am., AFL-CIO Local 13000, 164 F.3d 197, 200 (3d Cir. 1999). This principle includes issues such as "exhaustion of prearbitration steps." Id. at 201. Whether the meeting is a mandatory condition precedent to arbitration and whether Jefferson failed to comply therewith, therefore, are issues to be resolved by the arbitrator.

In summary, the Court cannot state 'with positive assurance' that the arbitration clause is not susceptible of an interpretation that covers Jefferson's claims. Neither is this Court empowered to determine whether Jefferson failed to comply with any conditions precedent to arbitration. The Court, therefore, denies NeuroSource's Motion for a Stay of Arbitration.

B. Arbitrability of NeuroSource's Claims

The Court now turns to Jefferson's Motion to Stay. Jefferson argues that NeuroSource's claims are referable to arbitration under the Agreement. Under the FAA, if a party files suit upon any issue referable to arbitration under a written agreement, the court must stay the trial until after

arbitration is complete if another party so requests. 9 U.S.C. § 3 (1994). The only time a court can refuse to stay the proceedings is if the court finds either that the issue is not subject to arbitration, 9 U.S.C. § 3 (1994), or the party has not agreed to arbitrate its claims. John Hancock, 151 F.3d at 137. Prior to ordering arbitration, the court must determine (1) whether the parties entered into a valid arbitration agreement, and (2) whether the specific dispute falls within the scope of that agreement. John Hancock, 151 F.3d at 137. In conducting this review, the court should apply "ordinary contractual principles, with a healthy regard for the strong federal policy in favor of arbitration." Moses H. Cone, 460 U.S. at 24. Once the court answers these two questions in the affirmative, the court must stay or dismiss the proceeding in favor of arbitration. John Hancock, 151 F.3d at 137; Seus v. John Nuveen Co., Inc., 146 F.3d 175, 179 (3rd Cir.), cert. denied, 525 U.S. 1139 (1999). Neither party argues that the arbitration agreement was invalid. The primary issue, therefore, is whether the claims raised by NeuroSource fall within the scope of the Agreement.

The Court first concludes that Counts I - III, seeking money damages for breach of contract, and Count IV, alleging defamation for the manner in which Jefferson evicted NeuroSource from the premises, clearly fall within the Agreement's general arbitration provision and are not excluded from arbitration as claims under Article VII. Article VII merely provides that Jefferson's payment obligations do not disappear upon termination of the Agreement. In contrast, these claims for breach of contract relate to Jefferson's failure to make specific monetary payments required by other articles and sections of the Agreement. (See Agreement at 25, 6-1 - 6-8.) Count IV for defamation does not directly address any obligation created under Article VII.

The Court agrees that NeuroSource cannot evade arbitration of its claims by inclusion of Count V seeking an injunction against arbitration of Jefferson's claims. Although the arbitration

clause exempts from arbitration "claims by NeuroSource for injunctive or equitable relief," Count V is the functional equivalent of a motion to stay arbitration. (Agreement ¶ 9.6.) NeuroSource cannot use this count to circumvent arbitration of its otherwise-arbitrable claims.

III. CONCLUSION

For the above reasons, the Court grants Defendant's Motion and denies Plaintiff's Motion. This case will be stayed pending arbitration of Jefferson's claims. The Court further determines that NeuroSource's claims asserted in this suit are subject to arbitration. An appropriate Order follows.